



EMJ (Minor Suing Through His Father and Next Friend JM) v Auma & another (Civil Appeal E087 of 2024) [2025] KEHC 16032 (KLR) (5 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16032 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E087 OF 2024
RM MWONGO, J
NOVEMBER 5, 2025**

BETWEEN

EMJ (MINOR SUING THROUGH HIS FATHER AND NEXT FRIEND JM) APPELLANT

AND

**ALOYCE AMOKE AUMA 1ST RESPONDENT
PATRICK GATHONI 2ND RESPONDENT**

(Appeal arising from the decision of Hon. J.W. Gichimu, CM in Runyenjes MCCC No. E086 of 2021 delivered on 26 th September 2024)

JUDGMENT

The Appeal

1. Through a memorandum of appeal dated 04th October 2024, the appellant is seeking the following orders:
 - i. The Appeal be allowed with costs on the following terms:
 - a. The Judgment of the Trial Court be discharged and or set aside with costs to the Appellant;
 - b. The Respondents be held 100% liable for the accident;
 - c. General damages be awarded to the Appellant as prayed in the Plaintiff;
 - d. Special damages be assessed by this Honourable Court as prayed in the Plaintiff;
 - e. Costs of the lower Court be awarded to the Appellant; and



- f. Interest in (c), (d) and (e) above.
 - ii. Costs of this Appeal be awarded to the Appellant; and
 - iii. Any other further relief that this Honourable Court may deem fit and just to grant.
2. The grounds of appeal are as follows:
 1. The Learned Magistrate erred in law and in fact in dismissing the Appellant's suit yet it is manifestly clear that indeed the Appellant was injured in the accident as pleaded and proved by the evidence on record;
 2. The Learned Magistrate erred in fact and in law in applying a standard of proof higher than that required in civil cases; that is on a balance of probability;
 3. The Learned Magistrate erred in law and in fact in failing to hold that the Appellant's case was unchallenged and uncontroverted and thus failed to wholly hold the Respondents liable for causing the accident;
 4. The Learned Magistrate erred in fact and in law in failing to award special damages despite production of receipts which were exhibited and produced in evidence during Hearing;
 5. The Learned Magistrate erred in law and in fact in failing to award costs and interests of the suit to the Plaintiff;
 6. The Learned Magistrate erred in law and in fact in failing to balance the weight of evidence by the Appellant as against that of the Respondents' case and thus arriving at an erroneous decision;
 7. The Learned Magistrate erred in law and in fact in failing to consider the Appellant's submissions and authorities filed court; and
 8. The Learned Magistrate erred in law and in fact in to totally misapprehending and misconceiving the Appellant's suit and eventually dismissing the same contrary to the weight of the documents and evidence on record.

Background

3. The appellant through a plaint dated 22nd July 2021, sought judgment against the respondents jointly and severally for special damages of Kshs.18,220/=, general damages, costs of the suit and interests. His claim was that on or about 12th October 2020, he was a pillion passenger onboard motor cycle registration number KMDC 666A along Embu-Runyenjes Road. Thereupon a motor vehicle, registration number KCC 212L was in the process of overtaking when it was not safe to do so, was driven negligently so that it collided into the motor cycle that the appellant was onboard.
4. As a result, the appellant suffered severe bodily injuries which are pleaded in the plaint as follows:
 - i. Head injury;
 - ii. Fracture base of the skull;
 - iii. Brain contusion and oedema;
 - iv. Right parietal region cut wound approximately 10cm length; and
 - v. Right shoulder bruise.



5. According to the appellant, the 1st respondent was the registered owner of the motor vehicle registration number KCC 212L while the 2nd respondent was its beneficial owner/driver/user at the time of the accident.
6. The respondents filed a statement of defense in which they denied the allegations made in the plaint and stated that the rider of the motor cycle contributed to the occurrence of the accident by failing to adhere to traffic rules. That the appellant was an excess passenger on the motor cycle without protective gear hence he was exposed to risk of injury.

The Evidence in the trial Court

7. PW1 was JMN who stated that on the day of the accident, his son and brother were pillion passengers on motor cycle registration number KMDC 666A which was involved in an accident at Ena area. He was informed of this accident by a good Samaritan who had witnessed it. He rushed to the accident scene but found that his son had been rushed to Embu Level 5 Hospital for treatment.
8. He then went to the said hospital where he found his son had been admitted and was being treated for severe bodily injuries as detailed in the plaint. He obtained a P3 form and then sought legal representation before bringing the matter to court on behalf of the minor to seek compensation. He blamed the driver of motor vehicle registration number KCC 212L for the accident. He stated that his son had not fully recovered from the injuries resulting from the accident.
9. In cross-examination, he stated that he has the child's birth certificate. He did not witness the accident but the driver of the lorry knocked the motor cycle down while it was being ridden off the road.
10. The respondents did not call any witnesses; However, they produced a medical report for a second medical examination conducted upon the appellant as evidence.

Findings of the trial court.

11. In its judgment, the trial court found that the evidence adduced did not prove on a balance of probabilities that the respondents were negligent and thus liable for the accident. It found that the appellant had not discharged its duty of proof. Had he done so, the court would have awarded a sum of Kshs.850,000/= as general damages for pain and suffering and loss of amenities. The appellant's case was dismissed with costs to the defendants.

Parties' Submissions on Appeal

12. The appellant submitted that he duly discharged the burden of proof but the trial court did not consider the evidence which proved liability upon the respondents. That the intended award of the trial court if the suit had succeeded was inordinately low and it was not based on comparative cases. That the trial court should have considered general damages of Kshs.1,500,000/= with reference to the case of Joseph Gichuhi Thomas v K G (Minor suing through his mother and next friend S N N) [2018] KEHC 6041 (KLR).
13. He submitted that the trial court also erred in failing to award him special damages yet the receipts were produced as evidence. He relied on the cases of Hahn v Singh [1985] KLR 716 and Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] KECA 79 (KLR). He also prayed that after the case has succeeded in this appeal, costs should follow the event according to section 27 of the *Civil Procedure Act* and the case of Supermarine Handling Services Ltd v Kenya Revenue Authority [2010] KECA 373 (KLR).



14. The respondents submitted that the duty of an appellate court is to reevaluate the evidence adduced before the trial court and make a finding as was stated in the cases of *Wahome (As Legal Representative of the Late Watson Wahome Njuru) v Muruti & another (As Legal Representative of the Estate of the Late Joseph Muturi Kurutu)* [2024] KEELC 7072 (KLR) and *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 at page 126. They stated that the fact that the respondents did not call any witnesses did not absolve the appellant from his duty to prove his case to the required standard.
15. For this argument, they relied on the cases of *Phillis Wangui Kitavi & another v Stephen Parasho Kaito* [2018] KEELC 3148 (KLR), *Evans Mogire Omwansa v Benard Otieno Omolo & another* [2016] KEHC 7139 (KLR) and *Patrick Muli v EM (Minor suing through her Mother and Next Friend WG)* [2021] KEHC 9034 (KLR). They argued that if the court should find liability against them, it should not depart from the position taken by the trial court on quantum, and they relied on the case of *Butt v Khan* [1978] KECA 24 (KLR).

Issue for Determination

16. The issue for determination is whether the trial court erred in dismissing the appellant's case.

Analysis and Determination

17. It is trite law that it was the duty of the appellant to adduce proof upon alleging negligence on the part of the respondents. At the trial, he adduced evidence and availed one witness who was his father. It is the duty of this court to reexamine that evidence and reach a finding. This was held in the case of *Coghlan v. Cumberland* (1898) 1 Ch. 704, where the Court of Appeal (of England) stated as follows:

“ Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen.”

18. Section 107 (1) of the [Evidence Act](#) provides that:

“ Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”

19. The evidential burden is further established under sections 109 and 112 of the [Evidence Act](#). In the case of *Evans Nyakwana v Cleophas Bwana Ongaro* (2015) eKLR the evidential burden was discussed and the court stated as follows:

“ As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the [Evidence Act](#), Chapter 80 Laws of Kenya. Furthermore, the evidential burden...



is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”

20. The standard of proof in civil cases such as this one is on a balance of probabilities. In the case of *Miller v Minister of Pensions* (1947) 2 All ER 372 the court, in discussing the burden of proof, had this to say:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not. This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

21. Liability is a matter of fact which is proved through evidence availed to the court. The proceedings and documents listed in the appellant/plaintiff’s list of documents were all produced as evidence. One of these documents is a police abstract which indicates that an accident occurred involving the respondents’ motor vehicle and the appellant’s rider’s motor cycle as described in the plaint. The injured persons are noted therein as the appellant, EMJ and another person. PW1 also produced medical records including a medico-legal report authored by Humphrey Ndwiga wherein the details of the injuries sustained were disclosed.

22. PW1 testified that he was informed about the accident by a good Samaritan who witnessed it. He himself did not witness the accident and he did not know how it occurred. His testimony and the documents he produced did indicate how the accident occurred such that the court would be able to follow the facts and determine who was negligent. All the evidence available proved that there was an accident involving the named motor vehicle and motor cycle and the appellant sustained injuries as a result.

23. As mentioned hereinbefore, the standard of proof in civil cases is ‘on a balance of probabilities’. This standard was discussed by the court in the case of *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 as follows:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”



24. In other words, the evidence must first be available and then it must be such that it persuades the court on a balance of probabilities. In *Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another* (2015) eKLR, the judges of Appeal held that:

“Denning J. in *Miller Vs Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.” (See also the case of *Susan Kanini Mwangangi & another v Patrick Mbithi Kavita* [2019] KEHC 9906 (KLR)).

Conclusions and Disposition

25. In this case, the appellant failed to establish the very facts that would be examined by the trial court to persuade it on a balance of probabilities, or otherwise. These would or could include evidence to demonstrate or explain how the accident occurred; which vehicle was at fault, or the level of fault of each vehicle; the weather conditions; visibility; speed of vehicles; condition of vehicle; state of mind of the drivers; victims, and so on. Such information would assist the Court to determine liability. It was missing. Therefore, there is no error in the trial court’s finding that the evidence did not prove negligence against the respondents.
26. It follows that the issue of quantum cannot be determined because liability cannot be determined. The trial court needed not indicate its would-be award if the suit had succeeded. However, that is not an error of law or fact.
27. The appeal is hereby dismissed with costs to the respondents.
28. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 5TH DAY OF NOVEMBER, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

Ms. Sirma holding brief for Mwhia for Appellant

Ms. Mwangi for Respondents

Francis Munyao - Court Assistant

